

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:

CARLOS HUMBERTO D’ALESSANDRIA,
Debtor.

Case No. 05-14163-BKC-AJC
Chapter 7

_____/
WELLS FARGO FINANCIAL NATIONAL
BANK,

Adv. No. 05-1228-BKC-AJC-A

Plaintiff,

vs.

CARLOS HUMBERTO D’ALESSANDRIA,
Defendant.

_____ /

**ORDER GRANTING IN PART AND DENYING IN PART WELLS FARGO FINANCIAL
NATIONAL BANK’S MOTION TO ALTER OR AMEND OR FOR RELIEF FROM
ORDER GRANTING DEFENDANT’S MOTION TO ALTER JUDGMENT**

THIS CAUSE came before the Court on July 11, 2006 upon the Plaintiff, *Wells Fargo
Financial National Bank’s Motion to Alter or Amend or for Relief from this Court’s May 17,*

2006, *Order Granting Motion to Alter Judgment* filed May 26, 2006 (CP 63).

Wells Fargo National Bank (“Wells Fargo”) filed a Complaint against the Debtor/Defendant, seeking to except his debt to Wells Fargo from discharge pursuant to 11 U.S.C. §523(a)(2)(A) and 11 U.S.C. §523(a)(6). The Debtor filed a counterclaim against Wells Fargo for violations of the Truth in Lending Action, 15 U.S.C. §§1601 *et seq.* (“TILA”).

Wells Fargo and the Debtor moved for summary judgment. On February 27, 2006, this Court entered an order denying the parties’ cross-motions for summary judgment.

On March 24, 2006, this Court conducted a trial. At the close of Wells Fargo’s case, the Court granted the Debtor’s motion for directed verdict, and denied the Debtor relief on his counterclaim under TILA. The Debtor’s request for attorneys fees was consequently denied under TILA, but the Court improvidently awarded Debtor fees in the amount of fifty cents pursuant to 11 U.S.C. §523(d), based on an *ore tenus* motion made as the judge was walking out of the courtroom. This improvident action was an inappropriate response to the Debtor’s attorney quoting a portion of 11 U.S.C. §523(d) which states that the debtor shall be awarded attorney’s fees, and was a reaction to the Court’s impression that the Debtor had probably just beaten the system – not a result of the equities being with the Debtor but as a result of the creditor’s failure to document its position and prove its case. On April 6, 2006, the Court entered a final judgment memorializing its ruling.

On April 14, 2006, the Debtor timely filed a motion to alter the final judgment, in which he sought (i) attorneys fees and costs in excess of those awarded in the judgment, and (ii) reconsideration of the ruling that Wells Fargo did not violate TILA. On May 17, 2006, the Court granted the Debtor’s motion to alter the final judgment, amending and modifying same to include an increased award of attorneys fees to the Debtor and an award of costs. The Court awarded

costs in the amount of \$250.00 and fees in the amount of \$12,500.00, based on a representation by Wells Fargo's attorney that substantially more than \$13,000 in fees had been expended by Wells Fargo in the trial of the case. The Court did not alter its conclusion that Wells Fargo did not violate TILA.

On May 25, 2006, Wells Fargo timely filed *Wells Fargo Financial National Bank's Motion to Alter or Amend or for Relief from this Court's May 17, 2006, Order Granting Motion to Alter Judgment* filed May 26, 2006 (CP 63). Wells Fargo argues generally that its Complaint was substantially justified, as is evidenced by the Court's denial of summary judgment. Wells Fargo contends the testimony elicited at trial by Wells Fargo's employees; the signature on the credit application (which contained the language that the Debtor "read and agree[d] to all the terms and conditions which appear on all pages of th[e] Agreement"); and the Debtor's admission that he sold the subject property without disclosing same to Wells Fargo and without remitting the sale proceeds supports Wells Fargo's position that it had a reasonable factual basis for objecting to the Debtor's discharge of its debt.

Analysis

The Court believes that Wells Fargo's motion sets forth grounds to establish that its Complaint may initially have been substantially justified under 11 U.S.C. §523(a)(6), but as the case developed, the record as a whole establishes that Wells Fargo did not have the ability to prove the elements of its case under 11 U.S.C. §523(a)(2). Accordingly, relief under 11 U.S.C. §523(d) appears mandatory from the point Wells Fargo knew or should have known that it was not able to produce evidence to overcome the defense raised by the Defendant Debtor. Section 523(d) states, in pertinent part:

If a creditor requests a determination of dischargeability of a consumer debt under

subsection (a)(2) of this section, and such debt is discharged, the court *shall* grant judgment in favor of the debtor for the costs of, and a reasonable attorneys fee for, the proceeding if the court finds the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust. (Emphasis added).

The legislative history of section 523(d) makes it clear that awards of actual damages, as well as appropriately assessed punitive damages, costs and fees are appropriate in consumer cases, where a creditor has filed a proceeding to determine the dischargeability of a debt under section 523(a)(2). The stated purpose of 11 U.S.C. §523(d) is “to discourage creditors from initiating false financial statement exception to discharge actions in hopes of obtaining a settlement from an honest debtor anxious to save attorney's fees. Such practices impair the debtor's fresh start.” H.R.Rep. No. 595, 95th Cong., 1st Sess. 365 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 80 (1978) U.S.Code Cong. & Admin.News 1978, pp. 5787, 5866, 6321.

In this case, Wells Fargo argued, both in its motion for summary judgment and at trial, that the Debtor purchased a pen and two Rolex watches utilizing Mayor’s charge card, and pursuant to the charge card agreement, the Debtor granted to Mayors a security interest in the items purchased. As a result of the security agreement, Wells Fargo contends the Debtor’s sale of the purchased items, without notice to, authorization by or the consent of Wells Fargo violated the security agreement and the failure to remit the sale proceeds to Wells Fargo, as the secured creditor, was fraud.

Wells Fargo’s argument is one made under 11 U.S.C. §523(a)(6), not under 11 U.S.C. §523(a)(2). In fact, the Court believes that Wells Fargo had no basis to bring action against the Debtor under subsection (a)(2).

Cases holding a violation by fraud or false pretenses under 11 U.S.C. §523(a)(2)(A)

require that the creditor prove the debtor committed “actual fraud” in obtaining credit. *In re Chinchilla*, 202 B.R. 1010, 1013 (Bankr S.D. Fla. 1996).¹ The Complaint in this case made naked allegations that the extension of credit to the Debtor was procured through false pretenses, false representation or actual fraud. The Complaint alleged the Debtor made materially false representations regarding the repayment of the extension of credit of which he had no intention to pay, and that each misrepresentation was made with the intent to deceive Plaintiff Wells Fargo. However, Wells Fargo failed to allege facts to substantiate its claim in the Complaint and failed to introduce any evidence on fraudulent intent at trial.

At trial, Wells Fargo did not offer any evidence regarding any specific false representation made by the Debtor relating to a past or existing material misrepresentation. No evidence was presented to support the contention the Debtor obtained credit by any false representation or that he had no intention to pay for the pen and watches when he obtained the credit. There was one extension of credit in this case, on June 28, 2002, and subsequently, the Debtor made monthly payments.

To except a specific debt from discharge, a plaintiff must prove by a preponderance of the evidence that a Defendant’s conduct fits within the exception to discharge. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991). Exceptions to discharge must be strictly construed to give effect to the “fresh start” policy. *Equitable Bank v. Miller*, 39 F.3d. 301, 304 (11th Cir.1994). An actual, overt representation is the *sine qua non* of a section

¹To prove “actual fraud”, a creditor must establish (1) the debtor made representations; (2) that at the time he made those representations the debtor knew they were false; (3) that he made them with the intention and purpose of deceiving the creditor; (4) that the creditor relied on such representations; and (5) the creditor sustained the alleged loss and damage as the proximate result of the representations made. *St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d 672, 676 (11th Cir.1993).

523(a)(2)(A) violation. *In re Hunter*, 780 F.2d 1577, 1578 (11th Cir.1986); *In re Capps*, 193 B.R. 955, 959 (Bankr. N.D. Ala. 1995). The evidence indicated no false representation was made by the Debtor in obtaining the credit to purchase the pen and watches from Mayors, and Plaintiff submitted no evidence that it relied on any representation by the Debtor to its detriment.

Wells Fargo's argument focused on 11 U.S.C. §523(a)(6), not 11 U.S.C. §523(a)(2).

Section 523(a)(6) provides:

(a) A discharge under section 727 ... of this title does not discharge an individual debtor from any debt-

* * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity. 11 U.S.C. § 523(a)(6).

The Supreme Court addressed the issue of what conduct constitutes "willful and malicious" in *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998) affg, *Geiger v. Kawaauhau (In re Geiger)*, 113 F.3d 848 (8th Cir.1997). The Supreme Court echoed the Eighth Circuit Court of Appeals' interpretation that "[i]t is necessary that it [a § 523(a)(6) action] be based on the commission of an intentional tort," *Geiger*, 113 F.3d at 853, and stated that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, nor merely a deliberate or intentional act that leads to injury ... Negligent or reckless acts ... do not suffice to establish that a resulting injury is 'willful and malicious.' " *Kawaauhau*, 523 U.S. at 61-64, 118 S.Ct. at 977-78.

The intentional tort implicated in this case is conversion. Conversion is the unauthorized assumption of the right of ownership over the personal property of another to the exclusion of the owner's rights. See *Villanueva v. Youngblood*, 927 So.2d 955 (Fla. 2d DCA 2006); *Warshall v. Price*, 629 So.2d 903 (Fla. 4th DCA 1993). Wells Fargo argued the Debtor's conduct here

constituted conversion inasmuch as the Debtor appropriated the proceeds from the sale of the purchased items as his own instead of paying them over to the secured creditor.

Plaintiff's motion to alter or amend has alleged facts and legal theories to justify its proceeding under section 523(a)(6). However, Plaintiff's motion to alter or amend provided no facts to justify its having filed or proceeded with an action under section 11 U.S.C. §523(a)(2)(A).

Although the Plaintiff has not established that special circumstances would render the award of fees unjust,² the Court does believe that the previous award of fees, in the amount of \$12,500.00, is excessive for this case. Upon further review of the time records filed by Debtor's attorney, the Court finds that the time reflected on Debtor's attorney's time records from August 29, 2005 through February 12, 2006 is not compensable because, during this time frame, the Plaintiff had reasonable cause to pursue the 11 U.S.C. §523(a)(2)(A) action.

Beginning with the time expended starting February 27, 2006, the Debtor's attorney reported 17 time entries totaling 46.8 hours, and includes travel time on four of the entries. Travel time will not be allowed and the estimated amount of 4.0 hours is disallowed. The following time entries are allowed as indicated:

February 27, 2006	Pretrial	1.5 (reduced 1 hour for travel)	.5
February 29, 2006	Discussions	.4	.4
March 9, 2006	Review/Prepare	4.6 (reduced 1 hour for travel)	3.6

²Special circumstances have been held to be quite rare and the exception is narrowly construed. *Taucher v. Rainer*, 237 F.Supp.2d 7, 15 (D.D.C. 2002) citing *Hatfield v. Hayes*, 877 F.2d 717, 719 (8th Cir. 1989).

March 15, 2006	Trial Prep		1.6
	Review		.3
March 19, 2006	Review		.3
	Pretrial Order		2.5
March 21, 2006	Calander Call	2.3 (reduced 1 hour for travel)	1.3
March 22, 2006	Review Exhibit List	1.2 (excessive - reduced .5 hours)	.7
	Review Pretrial Order	2.2 (excessive - reduced 1.1 hours)	1.1
	Draft Opening Statment		1.5
	Prepare Disclosure	1.5 (excessive - reduced 1 hour)	.5
	Preparation of Opening Statement	5.6 (excessive - reduced 3.6 hours)	2.0
	Client Conference		1.8
March 23, 2006	Prepare for Trial	10.1 (excessive - reduced 5.1 hours)	5.0
March 24, 2006	Prepare for Trial/Trial	4.6 (reduced 1 hour for travel and reduced 1.1 hours as excessive)	<u>2.5</u> 25.6

An award of compensation at \$150 per hour is reasonable for services that were nothing but routine and which would have accomplished nothing had Plaintiff offered any admissible evidence in support of the key element of Plaintiff's case. Thus 25.6 hours for a total award of \$3,840.00 is reasonable under the principles set forth in *Matter of First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir. 1977) and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). This case was straight-forward and little, if no discovery was conducted by Debtor's counsel. The issue was a narrow one - whether the Debtor received the Mayor's security agreement so as to be binding upon the Debtor. No novel or complex issues were presented by

this case, and any research would have been minimal because the issue presented, and upon which this case hinged, was a question of fact.

The Debtor argues that fees should not be apportioned according to the prevailing counts in the Complaint, citing *In re Martinez*, 266 B.R. 523, 542 (Bankr. S.D.Fla. 2001) (any and all reasonable measures taken by counsel leading to a winning result deserve remuneration; arguing alternative theories may enhance a party's chances for victory in a lawsuit, and this practice should not be discouraged by allowing compensation only for the time spent on the prevailing claim). *Martinez* is not applicable under the circumstances herein as the court in *Martinez* did not decide entitlement to fees under section 523(d). Under section 523(d), the Court is charged with awarding reasonable fees, and the Court does not find an award of fees for the time expended on the TILA issue is reasonable. The Court believes an inordinate and excessive amount of time was expended on the TILA issue, which was ultimately determined to be inapplicable because Wells Fargo did not prove the security agreement was provided to the Debtor in the first instance. Even if the Court were to have found delivery of the agreement to be proven, the TILA argument was disingenuous and without merit.

It is

ORDERED AND ADJUDGED that Plaintiff, *Wells Fargo Financial National Bank's Motion to Alter or Amend or for Relief from this Court's May 17, 2006, Order Granting Motion to Alter Judgment* filed May 26, 2006 is GRANTED in part and DENIED in part; the judgment shall remain in favor of the Debtor/Defendant on all counts of the Complaint, fees and costs shall be awarded under 11 U.S.C. §523(d), but the amount of such fees shall be reduced from the inappropriate sum of \$12,500.00 to a reasonable fee of \$3,840.00.

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Copies furnished to:

Riley Cirulnick, Esq.
Lawrence Shoot, Esq.